U.S. Chamber of Commerce

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International Relations Committee
Subcommittee on the Western Hemisphere

"U.S. Trade Agreements with Latin America"
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In May 2004, the United States launched negotiations for a free trade agreement with Colombia, Peru, and Ecuador, dubbed the U.S.-Andean Free Trade Agreement (FTA). Several negotiating rounds have been held since that date, and officials with the Office of the U.S. Trade Representative have outlined a negotiating schedule aiming to conclude the agreement within the next few months. Bolivia is participating in the negotiations as an observer.

The U.S. Chamber of Commerce is the world's largest business federation, representing three million businesses of every size, sector, and region. The U.S. Chamber has long advocated closer trade relations between the United States and the countries of Latin America and the Caribbean through the Free Trade Area of the Americas (FTAA) negotiations as well as bilateral and sub-regional agreements such as the North American Free Trade Agreement (NAFTA), which has brought remarkable benefits to U.S. businesses, workers, and consumers. Another successful model is the U.S.-Chile FTA, which was implemented on January 1, 2004. This FTA is already delivering significant benefits for the U.S. economy as well, including a 33% increase in exports to that country in its first year of implementation.

In the same vein, the U.S. Chamber's top international trade priority for 2005 is Congressional approval of the landmark U.S.-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). As other witnesses in this hearing will surely report, U.S. companies and workers exported $15.7 billion in U.S. products to Central America and the Dominican Republic last year — more than the United States sells to India, Indonesia, and Russia combined. Two-way trade surpassed $33 billion in 2004. A U.S. Chamber study of DR-CAFTA's impact on a dozen states projects it will create over 25,000 new jobs in its first year — and over 130,000 new jobs in a decade.

Above all, the U.S. Chamber supports DR-CAFTA because it will level the playing field for U.S. workers. Today, 80% of Central American and Dominican products enter the U.S. market duty free; by contrast, U.S. merchandise exports to the six countries face tariffs that average 30% to 100% higher than the average U.S. tariff on imports from the six countries. In other words, these countries are enjoying nearly free access to our marketplace while our access to theirs remains limited. DR-CAFTA will fix this imbalance by immediately eliminating all tariffs on 80% of U.S. manufactured goods, with the rest phased out over a few years.

In similar fashion, many of our member companies and their employees stand to benefit directly from the proposed U.S.-Andean FTA. The agreement stands to boost trade and investment between the United States and several of our closest neighbors. Colombia, Peru, and Ecuador represent a significant potential market, with a population approaching 100 million and a collective GDP near $500 billion when measured on a purchasing power parity basis. Bilateral trade was near $24 billion in 2004.

The U.S. Chamber of Commerce supports the proposed FTA in principle. We believe the FTA will help promote the economic development of the Andean countries while providing new business opportunities for U.S. agriculture, industry, and service providers. However, we believe that a number of commercial disputes related to U.S. companies' investments in Peru and Ecuador must be resolved before concluding negotiations. Expeditious resolution of these disputes is a priority for the U.S. Congress, the Bush Administration, and the U.S. Chamber of Commerce.

Resolving Ongoing Investment Disputes

A number of persistent disputes between U.S. companies that have invested in Peru and Ecuador and the respective national governments stand as a substantial obstacle that could block the participation of these countries in a free trade agreement with the United States. The few remaining months of the negotiations represent a critical opportunity for governments to resolve these disputes.

It is noteworthy that the government of Colombia, under the leadership of President Alvaro Uribe, has moved to resolve a number of the most difficult disputes in that country and to improve the business climate generally. His leadership and the diligence of other members of the Colombian government to resolve a number of thorny problems serve as an example to other governments.

The situation in Peru is more difficult, and details relating to investment disputes in that country are well known to a variety of U.S. officials, obviating the need for a detailed account in this document. Notable common threads in the disputes include aggressive and often questionable tax assessment strategies involving foreign firms; uncertainty regarding which agency or branch of government has authority to resolve a dispute; and a lack of respect for legal and tax stability agreements entered into by the government.

The U.S. Chamber is particularly worried about a number of disputes revolving around the Peruvian tax agency, known by its Spanish-language acronym, SUNAT. Too often,

SUNAT's dealings with companies appear to be inconsistent with Peruvian law, and the agency has ignored procedural timelines repeatedly in some cases.

In one high profile case, SUNAT has repeatedly appealed tax court rulings in favor of Luz del Sur, a U.S.-owned utility. As background, the privatization of ElectroLima created two regional electric utilities, Edelnor and Luz del Sur, each of which serve half of the city of Lima. Both companies inherited the same accounting books from ElectroLima and used the initial asset values they contained to revaluate them later to market prices, as allowable under Peruvian law. While SUNAT has allowed a revaluation of only 35% for Luz del Sur's assets, it has permitted a 171% revaluation for Edelnor. This discriminatory treatment for two halves of the same company — in the same business, in the same city, in simultaneous revaluations — raises serious questions about Peru's investment climate.

On a positive note, the Peruvian government has resolved several disputes, and the newly created position of Taxpayer Advocate, sometimes referred to as an ombudsman, represents a step forward. The Taxpayer Advocate has helped to limit some of SUNAT's ability to prolong unnecessary procedural argumentation indefinitely, though the fact remains that major SUNAT-related disputes have yet to be resolved.

The investment climate is also difficult in Ecuador, where several major U.S. investors are involved in disputes with the government. Among the difficulties that have kept foreign investors away are the government's failure to pay its bills to private companies and its willingness to see spurious lawsuits against multinationals pursued in domestic courts.

In one case, the Ecuadorian government has failed to comply with its own law in a dispute involving Interagua, an affiliate of the Bechtel Corporation, which is a concessionaire for the supply of water services in Guayaquil. The government has not complied with provisions in the original telephony and radio communications law, 175, and its successors, which directed that two-thirds of the revenue generated by a 15% surcharge on telephony bills be automatically deposited in a trust mechanism for Interagua. Provisions of the concession contract have effectively prevented Interagua from obtaining the necessary long-term debt financing to complete the expansion of the potable water and sewage connections stipulated in the contract. Continued non-compliance by the Ecuadorian government could lead to large financial losses by Interagua and failure of the utility to provide adequate water and sewage services to the people of Guayaquil.

The U.S. Chamber is also very concerned about the lawsuit faced by ChevronTexaco Corporation in Ecuador, which potentially represents an instance of "global forum shopping." In 2003, a group of Ecuadorian citizens filed an action against a predecessor, fourth-tier subsidiary that was part of a now-defunct consortium of companies that included elements of the Ecuadorian government. The consortium had been licensed by the Ecuadorian government between the years of 1964 and 1992 to explore and produce oil. This legal claim is contrary to a standing 1995 Settlement and Release Agreement between ChevronTexaco and the government of Ecuador, including its state-owned oil company, Petroecuador, which was a member of the former consortium. In fact, the Ecuadorian government certified in 1998 that ChevronTexaco fulfilled all terms of the Agreement, pouring nearly $50 million into the Oriente region in the form of environmental remediation programs and social projects to directly benefit the local

communities. To resolve the dispute, the Ecuadorian government must honor the Joint Operating Agreement which defined its partnership with Texaco by admitting its responsibility for the situation involving ChevronTexaco in the Oriente and define a plan of action to resolve these concerns, thereby eliminating the basis for naming ChevronTexaco as the sole defendant in the lawsuit.

Preventing Future Investment Disputes

One major reason the U.S. Chamber supports the proposed FTA is that it represents strong medicine to prevent certain kinds of disputes from arising in the future. This is accomplished through the creation of a more transparent rules-based business environment which in turn will help enhance democratic institutions, business transparency, and economic reform. For example, the FTA will guarantee transparency in government procurement, with competitive bidding for contracts and extensive information made available on the Internet — not just to well-connected insiders. It will also create a level playing field in the regulatory environment for services, including telecoms, insurance, and express shipments.

Another instance where we expect the FTA to improve the business climate in the Andean countries relates to dealer protection laws. Such laws represent a significant trade and investment barrier for U.S. companies seeking to do business in the region. In some cases, these laws provide local dealers and distributors of products, services, and trademarks owned by foreign principals with exaggerated protections, locking manufacturers into exclusive dealership arrangements. In some cases, U.S. companies have no way to discipline a nonperforming dealer. The recently negotiated DR-CAFTA dealt with this matter effectively, and the U.S.-Andean FTA should use that agreement as a model in this regard.

In addition, the proposed FTA also represents an important opportunity to strengthen legal protections for intellectual property rights in the region, as well as the actual enforcement of these rights. For the pharmaceutical patent-based industries, ongoing violations of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as provisions of the Andean Trade Preference Act (as amended in 2002) in some of the Andean countries are a source of serious concern. This is particularly true with regard to the failure to protect confidential and exclusive test data in the research-based pharmaceutical sector. The U.S. Chamber submitted more detailed comments on negotiating priorities to the inter-agency Trade Policy Staff Committee on March 17, 2004.

The government of Colombia took a positive first step last year with the promulgation of Decree 2085, which protects confidential test data provided to the authorities upon registering a patent. Peru and Ecuador should take the necessary administrative steps to ensure that no new or additional unauthorized copies of innovative drugs are given a sanitary registration and/or marketing approval inconsistent with data exclusivity. This provisional protection should remain in place until such time that Peru and Ecuador complete implementation of meaningful and effective data exclusivity language.

Resolving Future Investment Disputes

A final reason the U.S. Chamber in principle supports the FTA is the promise it holds to establish dispute settlement mechanisms designed to provide timely recourse to an impartial tribunal. Such "Investor to State Dispute Settlement Procedures" (ISDPs) are included in over 40 bilateral investment treaties (BITs) between the United States and other countries, many of which have been in force for decades, as well as in FTAs.

ISDPs provide for dispute settlement panels operating under international legal standards that mirror U.S. Constitutional protections against arbitrary government actions and against taking of property without compensation. In developing countries where local judiciaries are at times slow, ineffective, or corrupt, U.S. companies have benefited from recourse to ISDPs. The existence of such procedures in a BIT or FTA represents a boon to the investment climate, even though the number of cases tried is typically very small (e.g., a total of just over 30 cases have been brought under NAFTA's Chapter 11 in all three countries over the past ten years). The value of the investments involved in these cases is small compared to the hundreds of billions of dollars that U.S. companies have invested in countries with which the United States has BITs or FTAs that feature ISDPs.

In this vein, the FTA should include a requirement that the signatory countries take the necessary steps to accede to arbitral conventions, including New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

Conclusion

The U.S. Chamber believes that a free trade agreement with the Andean countries has the potential to improve the region's investment climate and economic development prospects. Above all, the rules included in such an agreement promise to level the playing field for U.S. and local businesses in important ways, including measures to ensure transparency in government procurement, stronger protections for intellectual property, and access to international arbitration for investment disputes. In this sense, the FTA is a significant part of the solution to the problems that beset the investment climate in some countries.

However, the support of the U.S. Congress, the Bush Administration, and the U.S. Chamber of Commerce for the inclusion of Peru and Ecuador in the U.S.-Andean Free Trade Agreement is tempered by the need to secure the rapid resolution of the disputes cited above. While we understand that each case is different in nature, and some cases may require additional time to resolve, these disputes continue to cast a cloud over the negotiations. While some cases pending before international arbitral panels are subject to fixed timetables, it is certainly reasonable to require the final resolution of many of these cases, including those involving Peru's SUNAT. We have had enough of roadmaps. We need action, not words — *hechos, no palabras*. If the opportunity to conclude a free trade agreement with the United States should fall by the wayside, Peru and Ecuador may have to wait years for another chance to enter into such an economic relationship with the United States. In this sense, Peru and Ecuador are at a critical juncture in their economic development. It is incumbent upon those two governments to demonstrate their resolve.